

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NOS. 29-CA-177992, 29-CA-179767, 29-CA-184505

PrimeFlight Aviation Services, Inc.,

Respondent,

and

**Service Employees International Union
Local 32BJ,**

Charging Party.

**RESPONDENT’S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE AND REQUEST FOR ORAL ARGUMENT**

Respondent PrimeFlight Aviation Services, Inc. (“PrimeFlight” or “Respondent”), pursuant to Rule 102.46 of the Rules of the National Labor Relations Board (“NLRB” or “Board”), files the following Exceptions to the decision of Administrative Law Judge (“ALJ”) Mindy E. Landow, dated March 9, 2017.¹

1. Respondent excepts to the ALJ’s finding that “PrimeFlight Aviation Services, Inc. (PrimeFlight, Employer or Respondent) is an employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act.” (ALJD p. 19, lines 11-12.)

2. Respondent excepts to the ALJ’s failure to defer to the prior NLRB ruling involving Respondent, *PrimeFlight Aviation Services*, 353 NLRB 467 (2008) in a matter factually indistinguishable from this proceeding as it relates to the jurisdictional question

¹ The Administrative Law Judge’s decision is cited as “ALJD” followed by the appropriate page and line numbers.

presented involving the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (“RLA”) (ALJD p. 3, line 43 and n. 3.)

3. Respondent excepts to the ALJ’s erroneous application of *Spartan Aviation Industries*, 337 NLRB 708 (2002) as it relates to the NLRB’s obligation to refer cases to the National Mediation Board (“NMB”) under the RLA where the NMB has not previously declined jurisdiction. (ALJD p. 4, lines 1-14.)

4. Respondent excepts to the ALJ’s recognition of an implicit “shift” in the jurisdictional analysis applied by the NLRB and the NMB to cases involving NMB jurisdiction under the RLA. (ALJD p. 10, lines 35-37 and p. 10 n. 5 lines 50-52.)

5. Respondent excepts to the ALJ’s erroneous application of *Airway Cleaners LLC*, 41 NMB 262 (2014), and *Menzies Aviation, Inc.*, 42 NMB 1 (2014), finding that (a) employers were not within the NMB’s jurisdiction as derivative carriers under the RLA, and (b) the NMB has made a “shift” in its application of its jurisdictional standards. (ALJD p. 4, line 42 – p. 6, line 4; p. 10.)

6. Respondent excepts to the ALJ’s finding that Respondent was not subject to the substantial control of RLA carrier JetBlue Airways Corporation within the meaning of the RLA and the legal standards for substantial control of a derivative carrier by an RLA carrier enunciated by the NMB. (ALJD p. 9, lines 23-26.)

7. Respondent excepts to the ALJ’s finding that Charging Party Service Employees International Union Local 32BJ (“Charging Party”) represented a majority of Respondent’s employees at a time when Respondent had hired a substantial and representative complement of its workforce. (ALJD p. 17, lines 14-20.)

8. Respondent excepts to the ALJ's implicit and explicit findings that Respondent hired employees in response to a demand for recognition from Charging Party. (ALJD p. 16, lines 31-33.)

9. Respondent excepts to the ALJ's refusal to credit the reasonable and uncontradicted testimony of Matthew Barry regarding Respondent's intended hiring plans at JFK International Airport. (ALJD p. 16, lines 26-31.)

10. Respondent excepts to the ALJ's finding that Respondent unlawfully threatened certain of Respondent's employees with discharge for supporting Charging Party. (ALJD p. 19, lines 3-5.)

11. Respondent excepts to the ALJ's refusal to credit Respondent's evidence that Respondent had implemented a policy of deducting 30 minutes of pay each day to account for employees' meal breaks. (ALJD p. 18 n. 8, lines 48-53.)

12. Respondent excepts to the ALJ's finding that "The following unit constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All full-time and regular part-time employees employed by Respondent at JFK Airport excluding confidential employees, office clericals, guards and supervisors as defined by the Act." (ALJD p. 19, lines 15-20.)

13. Respondent excepts to the ALJ's finding that "Since May 23, 2016, and at all times material thereafter the Union has been, and is now, the exclusive collective bargaining of Respondent's employees in the above-described unit within the meaning of Section 9(b) of the Act." (ALJD p. 19, lines 21-24.)

14. Respondent excepts to the ALJ's finding that "PrimeFlight has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain

with the Union as the exclusive collective-bargaining representative of its employees in the unit.”
(ALJD p. 19, lines 25-27.)

15. Respondent excepts to the ALJ’s finding that “By refusing to provide [certain] information to the Union on and after May 23, 2016, Respondent has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act.” (ALJD p. 19, lines 28-29.)

16. Respondent excepts to the ALJ’s finding that “By making the following changes in terms and conditions of employment without affording the Union notice and an opportunity to bargain over such changes, Respondent has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act:

Since about August 26, 2016, deducting pay from employee's paychecks to account for unpaid break time;
Since about September 12, 2016, changing employee work schedules including work days and reducing hours.”

(ALJD p. 19, lines 36-43.)

17. Respondent excepts to the ALJ’s finding that “The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.” (ALJD p. 19.)

18. Respondent excepts to the ALJ’s conclusions of law as erroneous and unsupported in fact and law. (ALJD p. 19, lines 10-50.)

19. Respondent excepts to the ALJ’s remedy and order in their entirety. (ALJD p. 20, lines 1 – p. 21, line 35.)

20. Respondent excepts to the ALJ’s conclusions, remedy, and order because they contravene the Railway Labor Act and cannot be enforced by this proceeding. (ALJD p. 19, line 7 – p. 21, line 35.)

REQUEST FOR ORAL ARGUMENT

As discussed fully in Respondent's Brief in Support of Exceptions to ALJ's Decision, this case presents significant questions of law that (a) arise frequently in cases before the Board and (b) involve critical issues of the impact of labor disputes on interstate commerce. The central issues in this case include:

1. the respective jurisdictions of the NLRB and the NMB; and
2. the ability of an alleged successor employer to make critical hiring decisions over a period of weeks or months without waiving its rights under the National Labor Relations Act, though Respondent does not concede that the Act has any application to its operations.

Because of the significance of the issues presented in this case and the need for employers and professional employer organizations to have clear guidance on these matters, Respondent respectfully submits that oral argument is appropriate and will assist the Board's decision in this case.

WHEREFORE, for the reasons stated above and in Respondent's brief in support filed contemporaneously, Respondent requests that the Board grant its request for oral argument, reverse the ALJ's decision, and dismiss the complaint in its entirety.

Dated: May 15, 2017

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

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CERTIFICATE OF SERVICE

The undersigned certifies that on May 15, 2017, a copy of the foregoing *Respondent's Exceptions to the Decision of the Administrative Law Judge and Request for Oral Argument* has been filed via electronic filing with:

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